86-1029

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CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

No. _____

HARRY JAMES McNUTT, Petitioner,

v.

THE STATE OF ARIZONA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ARIZONA COURT OF APPEALS DIVISION TWO

GEORGE HASKEL CURTIS
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Counsel for Petitioner

November 24, 1986

Questions Presented

THE ARIZONA STATUTE DESTROYS THE LONG HISTORY OF CASES THAT REQUIRES EXIGENT CIRCUMSTANCES TO JUSTIFY WARRANTLESS SEIZURES

Parties

The caption contains the names of all parties. The State of Arizoan has been represented by the Attorney General of the State of Arizona, ROBERT CORBIN, and his assistant attorney general, DIANE RAMSEY.

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PETITION FOR A WRIT OF CERTIORARI
TO THE ARIZONA COURT OF APPEALS
DIVISION TWO

The Petitioner, HARRY JAMES McNUTT respectfully prays that a Writ of Certiorari issue to reverse the judgment and opinion of the Arizona Court of Appeals, Division Two, entered in this proceeding on May 4, 1986, mandate having issued on October 20, 1986.

Opinion Below

The opinion of the Arizona Court of Appeals, Division Two, in an unreported Memorandum Decision, appears in the appendix hereto. No opinion was rendered by the Arizona Supreme Court in this matter, and a Petition for Review was denied by the Arizona Supreme Court on October 7, 1986.

Jurisdiction

The judgment of the Arizona Court of Appeals, Divsion Two, was filed on May 4, 1986, (Mandate issuing on October 20, 1986). The Arizona Supreme Court denied the petition to review that decision on October 7, 1986, and this Petition for Certiorari was filed within 60 days of that final denial. This court's jurisdiction is invoked pursuant to 28 U.S.C. §1257(3).

Questions Presented

May the State of Arizona permit by statute the warrantless seizure of a previously drawn vial of an individual's

blood without the presence of any exigent circumstances, and without any prior judicial review.

Statutory Provisions Involved

Arizona Revised Statutes, Title 28 §692(M):

"Notwithstanding any provision of law to the contrary if a law enforcement officer has probable cause to believe that a person has violated this section and a blood sample is taken from that person for any reason a portion of that sample shall be provided to a law enforcement officer if requested for law enforcement purposes. A person who fails to comply with this subsection is guilty of a class 1 misdemeanor."

Statement of the Case

Petitioner was charged on November 29, 1984, in Pima County, Arizona, with the crime of manslaughter (A.R.S. §13-1103

(A)(1) and (B)), driving while under the influence, and driving with a blood alcohol level greater than .10, (A.R.S. §28-692(A) and (B)). At trial, the petitioner was acquitted of the manslaughter, but found guilty of the two "D.U.I." counts.

Prior to trial, the court ruled, pursuant to A.R.S. §28-692(M), that the seizure of a vial of blood taken from petitioner by his doctor for medical purposes, was proper under Arizona law. Further, that said Arizona statute was not unconstitutional under the Fourth and Fourteenth Amendments to the United States Constitution.

In the early evening hours of November 11, 1984 in Tucson, Arizona, a vehicle driven by petitioner and one by DEAN RICE collided, resulting in MR. RICE'S death. Petitioner was taken to a local hospital, at which time a physician, concerned about a possible head injury to petitioner, drew

his blood. That blood was seized immediately thereafter by a Tucson Police Officer pursuant to A.R.S. §28-692(M). The evidence at the Motion to Suppress hearing clearly established that the blood sample would not have been destroyed by the hospital in its tests, and that said sample could have been tested at any time thereafter to answer the prosecution's question concerning blood alcohol level. However, the officer, acting without a warrant and without petitioner's consent, seized the blood sample. The test results were entered into evidence at trial, and must certainly have been the primary, if not the sole, evidence as to whether petitioner possessed a blood alcohol level of greater than .10 at the time of the accident.

In the decision of the Arizona Court of Appeals, the sole determining factor was whether probable cause existed.

No mention was made as to whether exigent circumstances must exist in such cases to avoid the normal requirement for a search warrant. Reference was made to the prior case of State v. Salazar, _____ Ariz. _____, 707 P.2d 591 (App. 1985), a previous Arizona Court of Appeals case that upheld the validity of the questioned statute. The Arizona Supreme Court has refused to overrule either State v. Salazar, supra., or the decision in this case, as petitions to review by the Arizona Supreme Court were refused in both cases.

Reasons for Granting the Writ

THE ARIZONA STATUTE DESTROYS THE LONG HISTORY OF CASES THAT REQUIRES EXIGENT CIRCUMSTANCES TO JUSTIFY WARRANTLESS SEIZURES.

By statute, the Arizona legislature has ended the Fourth Amendment application to states. Simply put, A.R.S. §28-692(M) states that, as interpreted by the Arizona

courts, whenever a police officer has probable cause to believe that a blood sample exists which would supply proof that an individual has consumed intoxicants, that officer may seize that sample without the need for an application to a court for a search warrant. (Consent does not enter into the question, as the statute creates a crime for failure to turn the blood sample over to the officer upon request).

This law exists in spite of the fact that there are no exigent circumstances which exist to justify immediate seizure. Arizona law does not permit the non-consenual taking of a person's blood, with or without probable cause. (A.R.S. §28-691). As such, the question presented has nothing to do with Schmerber v. California, 384 U.S. 757, 868 S. Ct. 1826, 16 L. Ed. 2d 908 (1966).

However, once the blood sample is taken, the fact of its existence in a controlled setting, i.e. a glass vial, ensures that its evidentuary value will not be lessened, as the blood alcohol level remains constant within the vial for months, if not years. The hospital therefore maintains that sample (or in this case, three samples) for its present and future testing.

The State has no justification, per Schmerber, supra., that time alone will destroy the evidence. Rather, it is generally agreed that the blood sample can be tested almost at any time subsequent to its storage in the vial. In fact, the State did not actually test the blood for days after its seizure.

The Arizona courts admit that exigent circumstances do not exist under the situations that must be present for the

statute to apply. In State v. Salazar, ____ Ariz. ____, 707 P.2d 951 (App. 1985), the Court of Appeals stated:

> "While we recognize that the Arizona statute may permit securing the blood sample under less than exigent circumstances, we believe it passes constitutional muster by requiring that the officer must have probable cause to believe that the suspect has committed the offense of driving a motor vehicle while intoxicated."

Probable cause alone has never been sufficient to justify a warrantless seizure. Rather, it is the basis for granting of a warrant. Only in those situations where probable cause exists, and where exigent circumstances suggest that there is insufficient time to permit the issuance of a warrant, may a search and seizure take place without the necessity of a warrant. The failure of the State to prove exigent circumstances exist results in an unconstitutional foundation for the statute.

The Supreme Court of New Jersey, in State v. Dyal, 97 N.J. 229, 478 A.2d 390 (1984), reviewed a similar case involving seizure of a blood sample taken for medical purposes. That court set up a framework for judicial review to guard against unconstitutional acts. Arizona, however, has absolutely no such safety net.

Conclusion

This Arizona statute is repugnant not only for its permitted conduct, but additionally for its implications as to a sweeping ability to permit warrantless seizures by statute without prior judicial review. What reason is there for the long line of cases beginning with Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1001 (1961) that require judicial review prior to search and seizure by state officials. Apparently, simply by vote, the

Arizona legislature may provide for specific circumstances when the Fourth and Fourteenth Amendments to the United States Constitution can be avoided.

Such is not the case. For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Arizona Court of Appeals.

Respectfully Submitted,

By _____

GEORGE HASKEL CURTIS
CURTIS & CUNNINGHAM
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5610 E. 22nd Street
Tucson, AZ 85711
Counsel for Petitioner

November 24, 1986

Appendix

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, vs. HARRY JAMES McNUTT, Appellant.	2 CA-CR 4087 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 11, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT
OF
PIMA COUNTY

Hon. Bernardo P. Velasco, Judge

Affirmed

Robert K. Corbin, The Attorney General
by William J. Schafer III and Diane M. Ramsey
Phoenix
Attorneys for Appellee

CURTIS & CUNNINGHAM
by George Haskel Curtis
Tucson
Attorneys for Appellant

B I R D S A L L, Judge

This appeal is from judgment and sentence imposed following jury verdicts of guilty under A.R.S. §28-692(A), driving with 0.10% or more blood alcohol level. The appellant was found not guilty of manslaughter. His license was suspended and he was sentenced to probation with the conditions that he serve four months in jail and pay a fine of $1,000.00.

Facts

The appellant was drinking beer at a party in a Tucson park on November 11, 1984. When he eventually left, he was driving his pickup truck. He ran a stop sign and struck another car, killing its driver. His blood test revealed a 0.22% blood alcohol level.

The appellant contends the trial court erred: 1) in not suppressing the blood test result; 2) in permitting an officer to testify that he refused to permit the taking of a blood sample; and 3) in

imposing a disproportionate sentence.

We affirm.

Blood Test

Following the collision, the appellant was taken to a hospital for treatment of an injury he received. He refused to give a blood sample. However, when his treating physician advised that a sample was necessary for medical reasons, a sample was taken and, upon request, the officer was given a portion of that sample. A.R.S. §28-692(M) (Supp. 1985). That was the sample tested.

The officer had probable cause to believe the appellant was intoxicated. Therefore, the sample was lawfully secured by the police and the trial court properly denied the motion to suppress. State v. Salazar, ____ Ariz. ___, 707 P.2d 591 App. 1985).

Evidence of Refusal

Evidence of refusal to submit to a blood alcohol test is generally admissible. State v. Superior Court ___ Ariz. ____, ___ P.2d ___ (2 CA-CIV 5626, filed May 1, 1986). A.R.S. §28-692(K). We do not believe the fact that the police obtained a sample despite the appellant's refusal affects the admissibility of the evidence. Even assuming error, it would be harmless in view of the overwhelming evidence of guilt.

Sentence

This argument is actually one of excessive sentence. It is answered by the fact that a death occurred. The appellant should have received a greater sentence than the usual DUI offender and did.

Affirmed.

/s/
BEN C. BIRDSALL,
Judge

CONCURRING:

/s/
JOSEPH M. LIVERMORE,
Presiding Judge

/s/
MICHAEL A. LACAGNINA,
Judge

SUPREME COURT
State of Arizona
1700 W. Washington
Phoenix, AZ 85007-2866

October 8, 1986

Re: STATE vs. HARRY JAMES McNUTT
Supreme Court No. CR-86-0200-PR
Court of Appeals No. 2 CA-CR 4087
Pima County No. CR-14389

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on October 7, 1986, in regard to the above-referenced cause:

ORDERED: Petition for Review = DENIED.

Record returned to Court of Appeals, Division Two, Tucson, this 8th day of October, 1986.

DAVID R. COLE, Clerk

TO: Hon. Robert K. Corbin, Attorney General - Attn: William J. Schafer, III, Esq., and Diane M. Ramsey, Esq.
George H. Curtis, Esq., Curtis & Cunningham
Joyce Goldsmith, Clerk, Court of Appeals, Division Two, Tucson,

des

Certificate of Service

I, hereby certify that on this 25 day of November, 1986 three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to:

Attorney General
State Capitol
Phoenix, AZ 85007
Attn: Diane Ramsey
Counsel for Respondent

I further certify that all parties required to be served have been served.

CURTIS & CUNNINGHAM
Attorneys at Law

By _____
GEORGE HASKEL CURTIS
Attorney for Petitioner
5610 E. 22nd Street
Tucson, AZ 85711

STATE OF ARIZONA)
County of Pima)

SUBSCRIBED AND SWORN TO before me this 25 day of November, 1986.

Debbie Rendon
Notary Public

My commission expires:

My Commission Expires January 15, 1989

Certificate of Service

I, hereby certify that on the 12th day of December, 1986, three copies of the Amended Petition for Writ of Certiorari were mailed, postage prepaid, to:

Attorney General
State Capitol
Phoenix, AZ 85007
Attn: Diane Ramsey
Counsel for Respondent

I further certify that all parties required to be served have been served.

CURTIS & CUNNINGHAM
Attorneys at Law

By _____
GEORGE HASKEL CURTIS
Attorney for Petitioner
5610 E. 22nd Street
Tucson, AZ 85711

STATE OF ARIZONA)
County of Pima) ss.

SUBSCRIBED AND SWORN TO before me this 12th day of December, 1986.

_____
Notary Public

My commission expires:

My Commission Expires January 15, 1987